Supreme Court, U.S.
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No. 02-1505

IN THE
Supreme Court of the United States

THOMAS L. CAREY,

Petitioner,

v.

TONY EUGENE SAFFOLD,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal court of appeals correctly determined, based on the record before it, that a petition to the California Supreme Court had been filed "without unreasonable delay" and thus was timely under California law?

2. Whether the court of appeals properly exercised its discretion not to certify to the California Supreme Court the fact-based question whether petitioner's prior petition to that court had been filed "without unreasonable delay" and thus was timely under California law?

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BRIEF FOR THE RESPONDENT IN OPPOSITION

RELEVANT STATUTORY PROVISIONS

Section 2244(d) of Title 28, United States Code, provides as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT

1. *Statutory and case law background.* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires a state prisoner seeking a federal habeas corpus remedy to file his federal petition within one year after his state conviction has become "final." 28 U.S.C. § 2244(d)(1)(A). The statute also provides that the one-year limitations period shall be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." *Id.* § 2244(d)(2).

In *Carey v. Saffold*, 536 U.S. 214 (2002) ("*Saffold*"), this Court made clear that a properly filed application for state habeas relief is "pending" under Section 2244(d)(2) during the time between a lower state court's decision and the timely filing of a notice of appeal to a higher state court. Pet. App. 18a-21a (536 U.S. at 219-21). In California, unlike other States, prisoners typically seek appellate review of denials of their state trial court petitions not by filing an "appeal," but by filing a new "original" petition in the court of appeal and

then in the state supreme court. *Id.* 21a (536 U.S. at 221). This Court ruled in *Saffold*, with respect to California's unique original writ system, that the word "pending" in Section 2244(d)(2) encompasses the "intervals between a lower court decision and a filing of a new petition in a higher court," provided the new petition is timely filed. Pet. App. 23a (536 U.S. at 223).

As this Court noted in *Saffold*, Pet. App. 22a (536 U.S. at 222), California's appellate process in habeas matters is virtually unique among the States in another way. In almost every other State, habeas petitioners generally must file their notices of appeal within specified deadlines in order to be timely. *Id.* In California, however, petitioners seeking appellate review must file their original petitions with the court of appeal and supreme court "within a reasonable time." *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993); *see also In re Robbins*, 959 P.2d 311, 317 (Cal. 1998). A California court applying this imprecise standard may indicate in its order that the petition was untimely. *See Freeman v. Ramirez*, No. C 02-1979, 2002 WL 31236171, at *2 (N.D. Cal. Oct. 02, 2002) (four-year delay was unreasonable where California Supreme Court's denial order included citation to *In re Robbins*); *In re Robbins*, 959 P.2d at 312 n.1 (noting "hundreds" of non-capital habeas claims that are annually disposed of solely on procedural grounds, including the ground of untimeliness); *id.* at 340 n.34.

2. *Saffold.* In 1990, Tony Saffold, the respondent, was convicted of robbery, murder and assault. His conviction became final on direct review in state court in April 1992. On April 24, 1996, AEDPA took effect, requiring Mr. Saffold to initiate state habeas review of his conviction within one year. Pet. App. 17a (536 U.S. at 217). A week before expiration of this deadline, Mr. Saffold filed a habeas petition in state trial court, thereby tolling AEDPA's

limitations period. *Id.*[1] A few days after his trial-court petition was denied, he filed an original petition seeking review of the trial court's decision in the state court of appeal. That court denied his petition. *Id.* Four and one-half months later—on the very day he was notified of the court of appeal's denial of his petition, *see id.* 54a n.3; 92a n.1—Mr. Saffold filed an original petition seeking review of that ruling in the California Supreme Court. Pet. App. 17a, 26a (536 U.S. at 217, 226). The state supreme court also denied the petition, stating in a single sentence that it did so "on the merits and for lack of diligence." Pet. App. 17a (536 U.S. at 217-18). Mr. Saffold promptly filed his federal habeas petition. Pet. App. 17a.

The federal district court held that Mr. Saffold's federal habeas petition had not been filed within AEDPA's limitations period on the ground—now squarely rejected by this Court—that, even assuming Mr. Saffold *timely* filed his state court petitions, the AEDPA limitations period was not tolled during either the interval between the state trial court's denial of his petition and his filing in the court of appeal, or between the court of appeal's denial and his filing in the California Supreme Court. Pet. App. 18a (536 U.S. at 218); Pet. App. 90a-91a. The United States Court of Appeals for the Ninth Circuit reversed, holding that the federal limitations period is tolled between timely state filings, and concluding that Mr. Saffold's petition to the California Supreme Court had been timely because that court reached the merits of Mr. Saffold's claims. Pet. App. 18a (536 U.S. at 218-19); Pet. App. 55a-59a (*Saffold v. Newland*, 250 F.3d 1262, 1264-68 (9th Cir. 2001), *vacated*, 536 U.S. 214 (2002)). Judge O'Scannlain dissented from the panel's decision, arguing that the fact the California Supreme Court

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[1] Like Mr. Saffold's current federal petition, his state habeas petition asserted several non-frivolous claims of ineffective assistance of counsel at trial and on direct appeal of his conviction. Mr. Saffold maintains his innocence.

also reached the merits of Mr. Saffold's claim did not mean the petition was timely. Judge O'Scainlann relied in particular on the fact that the petition was denied in part "for lack of diligence." Pet. App. 62a-63a.

In *Saffold*, this Court agreed with the court of appeals that AEDPA's one-year limit is tolled during all the time that a habeas petition is pending in the California state courts, including all time in the superior court, on review through original petition in the higher state courts, and during the intervals or "gaps" between disposition in a lower state court and review in the next higher court, so long as each subsequent original petition is timely filed under state law. Pet. App. 18a-24a (536 U.S. at 219-25). For purposes of determining whether the latter condition was satisfied here, this Court also agreed with the federal court of appeals (and the dissent) that the critical issues are what the California Supreme Court meant when it denied Mr. Saffold's petition "on the merits and for lack of diligence," and whether this holding reflected a determination by the California Supreme Court that Mr. Saffold had not timely sought review in that court. This Court disagreed, however, that the state supreme court's denial of Mr. Saffold's petition "on the merits," by itself, resolved the timeliness inquiry. Pet. App. 25a-26a (536 U.S. at 225-27). It therefore remanded to the court of appeals to ascertain what the California Supreme Court meant when it *also* denied the petition for "lack of diligence." *Id.* In so doing, this Court observed that the court of appeals' original conclusion on this point—that the state supreme court had *not* ruled Mr. Saffold's petition untimely—may have been correct, in light of Mr. Saffold's contentions that (i) he filed his supreme court petition immediately upon receiving notification of the court of appeals' denial, and (ii) the phrase "lack of diligence" referred to the five-year interval between the date his conviction became final and the date he first sought state post-conviction relief—"a matter irrelevant to the question whether his application was 'pending'"—and *not* to the four and one-half month interval

prior to seeking state supreme court review. *Id.* The Court specifically left it to the court of appeals "to evaluate these and any other relevant considerations in the first instance." *Id.*

3. On remand, Judge O'Scannlain—who had dissented originally—wrote for a unanimous panel. The court of appeals recognized that the central issue on remand was "quite a narrow one, namely the meaning of the California Supreme Court's minute order denying Saffold's petition both 'on the merits' and 'for lack of diligence.'" Pet. App. 7a (*Saffold v. Carey*, 312 F.3d 1031, 1034 (9th Cir. 2003)).[2] The court of appeals concluded that the phrase "lack of diligence" referred not to any delay in the filing of the supreme court petition, but to the five-year delay that preceded the filing of Mr. Saffold's state trial court petition, which was irrelevant to the determination of whether the AEDPA limitations period had been tolled. Pet. App. 10a (312 F.3d at 1035-36). Judge O'Scannlain based this conclusion in part on several California Supreme Court orders in other habeas cases issued at or very near the time that the state court denied Mr. Saffold's petition. Pet. App. 9a. These other petitions involved delays that were comparable to or longer than the four and one-half month interval preceding Mr. Saffold's supreme court petition and nevertheless were not denied for "lack of diligence." Pet.

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[2] Initially, without briefing, the court of appeals remanded the case to the district court for an evidentiary hearing "so that the district court may determine, in the first instance, whether Mr. Saffold filed his original habeas petition in the California Supreme Court 'within a reasonable time after [he] knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim.' *In re Harris*, 855 P.2d 391, 398 n.7 (Cal. 1993)." Pet. App. 40a-41a. Upon Mr. Saffold's Motion for Enlargement of Time to File a Petition for Rehearing and to Recall the Mandate, the court of appeals recalled its mandate, *sua sponte* granted rehearing of its remand order, and ordered the parties to brief the proper disposition of the case in light of this Court's decision in *Saffold*. Following briefing, the Ninth Circuit ruled as discussed in the text.

App. 9a-11a (considering denials involving delays of seven to 18 months). Thus, the court of appeals concluded that Mr. Saffold's petition also was not untimely. The court of appeals denied the State's petition for rehearing. Pet. App. 4a.

ARGUMENT

The court of appeals' conclusion that Mr. Saffold's petition to the California Supreme Court was timely under California law is entirely reasonable, comports with this Court's decision in *Saffold*, and does not conflict with the decision of any other court of appeals that has considered whether state prisoners have timely sought appellate review of lower court habeas rulings under state law. That fact-based ruling does not warrant further review by this Court. The court of appeals' decision not to certify a question to the California Supreme Court also does not warrant this Court's review.

1. At bottom, the State of California (the "State") asks this Court to review the Ninth Circuit's interpretation of California state court rulings and its application of state law to the facts of this case. As a general matter, this Court "ordinarily accept[s] the determinations of the Courts of Appeals on questions of local law." *General Box Co. v. United States*, 351 U.S. 159, 165 (1956); *see also UNUM Life Ins. Co. v. Ward*, 526 U.S. 358, 368 (1999) ("We do not normally disturb an appeals court's judgment on an issue so heavily dependent on an analysis of state law."); *Rummel v. Estelle*, 445 U.S. 263, 267 n. 7 (1980) (deferring to court of appeals' rejection of State's assertion of procedural bar in habeas case); *Runyon v. McCrary*, 427 U.S. 160, 181-82 (1976). It does so because lower courts "are more familiar with the procedural practices of the States in which they sit." *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997). The court of appeals' unanimous conclusion that Mr. Saffold's supreme court filing was timely under the approach of the California state courts in the circumstances of this case is entitled to

such deference and in any event presents no significant issue of federal law.

2. Moreover, the issue of law presented here is almost entirely unique to California. As this Court recognized in *Saffold*, with the single apparent exception of North Carolina, all "[o]ther States . . . specify precise time limits, such as 30 or 45 days, within which an appeal must be taken, while California applies a general 'reasonableness' standard." Pet. App. 22a (536 U.S. at 222). How the Ninth Circuit divines what California courts deem "reasonable" in cases where the state courts do not provide a clear ruling is thus of virtually no moment anywhere else in the nation.

3. Not only are any consequences of the court of appeals' ruling here thus confined to California, but, as this Court observed in *Saffold*, California "through its Supreme Court decisions or legislation, can explicate timing requirements more precisely," *id.* 23a (536 U.S. at 223), and thus remedy any consequences of the Ninth Circuit's approach it views as untoward. *See also* Pet. App. 11a (312 F.3d at 1036) (inviting the California Supreme Court or state legislature to provide a "bright-line rule"). As noted, the need for the federal courts applying AEDPA here to ascertain what period is "reasonable" under California law arises only because the state legislature has not enacted a specific time period for seeking appellate review, because the state courts have not given general guidance on the applicable time period, and because the California Supreme Court did not clearly rule in this case. If the Ninth Circuit's approach is indeed problematic, therefore, the State can readily help itself without further involvement by this Court.

4. In any event, there is no merit to the State's contention that the ruling below conflicts with this Court's decision in *Saffold*. The court of appeals did not issue a broad ruling that federal courts *always* must conclude that a state habeas petition was timely filed absent an express state court ruling on the subject. Contrary to the State's contention

(Pet. 8, 12), the court of appeals ruled only that Mr. Saffold's state supreme court petition was timely under the circumstances of this case. In making this determination, the court of appeals compared: (a) the length of time between the state court of appeal's denial of Mr. Saffold's petition and the filing of his supreme court petition (four and one-half months) to (b) the timing of petitions in other cases where the California Supreme Court did not find a "lack of diligence" or otherwise indicate unreasonable delay. Pet. App. 9a-11a. Because a number of such petitions were filed after periods *longer* than the four and one-half month interval in Mr. Saffold's case, the federal court of appeals concluded that the phrase "lack of diligence" here did not refer to the four and one-half month period, and that Mr. Saffold's supreme court petition was timely.[3] The court of appeals did not state that its decision was *compelled* by the lack of any statement by the state court that four and one-half months was unreasonable. Instead, the fact that the state supreme court had not deemed similar or longer periods unreasonable in other cases decided in the same time frame supported the proposition that the period at issue was also not unreasonable under state law.[4]

Indeed, the court of appeals made clear that it had "not been asked to provide any bright-line rule for determining what constitutes 'unreasonable' delay under California's indeterminate timeliness standard," Pet. App. 11a n.1, and it did not provide one. And, although the State warns that the

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[3] In addition to the shorter time period, the court of appeals had before it Mr. Saffold's uncontradicted assertion that he first received notice of the state court of appeal's denial of his petition four and one-half months after it was issued, and that *on the same* day he received this notice he filed his supreme court petition. Pet. App. 54a n.3; *id.* 92a n.1. This Court had already observed that Saffold's explanation for the delay could support a finding that the supreme court petition was timely filed. Pet. App. 26a.

[4] Notably, the State has been unable to point to a single case in which the California Supreme Court has found a period shorter than four and one-half months to be "unreasonable."

ruling below will preclude other courts in the Ninth Circuit from applying California timeliness rules on a case-by-case basis, this fear has proven unfounded. As the State acknowledges (Pet. 9-10), in *Bennett v. Mueller*, the court of appeals recently found that a six-year delay was unreasonable under California law. *See Bennett v. Mueller*, 322 F.3d 573, 579-80 (9th Cir. 2003). Here, the court of appeals did not purport to address the many varying circumstances that might attend other cases that involve ambiguous state rulings—such as a delay that is regularly found by the California courts to be unreasonable, or lack of a proffered explanation from the petitioner. *See, e.g.*, *Peterson v. Hickman*, No. C 01-5230, 2002 WL 1578933, at *2 (N.D. Cal. July 15, 2002) (refusing to toll limitations period where seven-year delay "is unreasonable on its face . . . [a]nd petitioner sets forth no argument or evidence to compel a different conclusion"). Thus, the decision below does not present a broad "rule" meriting this Court's review—and is certainly not inconsistent with *Saffold*.[5]

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[5] The court of appeals' focus on the meaning of the phrase "lack of diligence" in the state supreme court's order follows this Court's guidance. In *Saffold*, this Court did not (Pet. 13-14) instruct the court of appeals to apply California law on timeliness to the facts of this case in disregard of the supreme court's order. To the contrary, this Court specifically asked the court of appeals, on remand, to re-examine the meaning of the phrase "lack of diligence." Pet. App. 26a (536 U.S. at 226). By way of example, this Court expressly noted that Mr. Saffold had contended that "'lack of diligence' referred to the delay between the date his conviction became final and the date he first sought state post-conviction relief—a matter irrelevant to the question whether his application was 'pending' during the 4-1/2 month interval." *Id.* Consistent with this mandate, the court of appeals decided this point favorably to Mr. Saffold. Nor was it contrary to this Court's decision in *Saffold* for the court of appeals to conclude that other state supreme court orders *not* citing a "lack of diligence" to support dismissal reflected rulings that the petitions there were timely filed. In *Saffold*, this Court addressed a very specific defect in the court of appeals' logic in its prior ruling: where the state court had denied a habeas petition *both* "on the merits" and "for lack of diligence," the federal court could not *assume*

5. Nor does the court of appeals' decision conflict with any decision of a sister court. The decisions of the Fifth, Seventh, Tenth and Eleventh Circuits cited by the State, three of which were issued prior to this Court's decision in *Saffold*, arose under state laws establishing a specific time period for the filing of an appeal--and involved appeals that were "undeniably untimely," Pet. 14-15, because they were filed outside specified periods. *See Melancon v. Kaylo*, 259 F.3d 401, 404 n.2, 406 (5th Cir. 2001) (30-day period under Louisiana law); *Fernandez v. Sternes*, 227 F.3d 977, 978-79 (7th Cir. 2000) (21-day period under Illinois law); *Gibson v. Klinger*, 232 F.3d 799, 802, 807 (10th Cir. 2000) (30-day period under Oklahoma law); *Moore v. Crosby*, 321 F.3d 1377, 1379 n.1, 1380-81 (11th Cir. 2003) (30-day period under Florida law). The unsurprising holdings of these courts—that an untimely state habeas appeal does not toll the limitations period for the period during which a petitioner unquestionably exceeded the deadline—are not inconsistent with the court of appeals' opinion on remand here, which addressed only the predicate question of whether Mr. Saffold's petition was untimely under California's imprecise legal standard.

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that the decision "on the merits" rendered the petition timely; the federal court also had to consider the meaning of the phrase "lack of diligence." This Court did not say that, when California courts deny habeas petitions on the merits but make *no* allusion to possible untimeliness, federal courts must independently inquire and decide whether each application for appellate review involved "unreasonable delay" under California law. Given California's indeterminate "reasonableness" standard, it would not be contrary to *Saffold* for federal courts to deem a delay "unreasonable" only if the California courts say it is. *Cf. Harris v. Reed*, 489 U.S. 255, 265 n.12 (1989) ("[A] state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.'"); *County Court of Ulster County v. Allen*, 442 U.S. 140, 153-54 (1979) (agreeing with court of appeals in habeas case that state court had not found procedural default when it "summarily rejected the [habeas] claim on its merits"); *Freeman*, 2002 WL 31236171, at *2.

Nor does the ruling here create any conflict with the Fourth Circuit's decision in *Allen v. Mitchell*, 276 F.3d 183 (4th Cir. 2001), which remanded a federal habeas petition to the district court for a determination whether the prisoner's prior North Carolina state court petition had been filed "'without unreasonable delay'" as required by state rules. *Id.* at 186-87 (citing N.C. R.App. P. 21(e)). As noted, in the present case, the Ninth Circuit could and did rely on guidance provided by state court decisions in other cases regarding timeliness. By contrast, at the time *Allen* was decided, the "without unreasonable delay" requirement had been barely mentioned by North Carolina courts, and there was no comparable body of precedents in other cases involving similar or longer pre-filing intervals.[6] Lacking such specific guidance, the Fourth Circuit concluded—without reference to North Carolina case law on post-conviction collateral relief—that the timeliness question under state law should be determined by reference to the equitable doctrine of laches, which, in turn, required findings as to whether petitioner's four-year delay in seeking state appellate review was "unreasonable" and "injurious or prejudicial" to the State. *See id.* at 187 (citing *Patterson ex rel. Jordan v. Patterson*, 529 S.E.2d 484, 492 (N.C. App.),

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[6] Respondent here is not aware of any North Carolina opinions construing Rule 21(c)'s "without unreasonable delay" requirement. In *Allen*, the court of appeals cited two North Carolina cases to support the proposition that its timeliness inquiry might hinge on application of the equitable doctrine of laches, but the proceedings at issue in those cases—a petition for certiorari in a land use dispute, *see White Oak Props., Inc. v. Town of Carrboro*, 327 S.E.2d 882, 886 (N.C. 1985), and a former wife's claim to retirement benefits against her former husband's estate, *see Patterson ex rel. Jordan v. Patterson*, 529 S.E.2d 484, 492 (N.C. App.), *review denied*, 352 S.E.2d 783 (2000)—did not refer to Rule 21(c) and dealt not at all with habeas procedure. In one North Carolina habeas case in which "unreasonable delay" was obliquely mentioned, the court ruled that no such delay occurred. *See State v. Niccum*, 238 S.E.2d 141, 144 (N.C. 1977). In any event, the Fourth Circuit's opinion in *Allen* evidences no consideration of any other state cases applying the state court's timeliness rules.

review denied, 544 S.E.2d 783 (N.C. 2000)). Thus, the Fourth Circuit's decision to remand merely reflected its determination that it lacked requisite information about how state law applied to the facts of the case, and that the district court was better situated to make that assessment. Given the plainly different state law regimes and different factual records presented to the federal courts of appeals in this case and in *Allen*, it cannot be said that the two federal courts acted inconsistently. *See Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-93 (1923) (dismissing writ as improvidently granted where cases "were really in harmony and not in conflict"); *Powell v. Nevada*, 511 U.S. 79, 86 (1994) (Thomas, J., dissenting).

6. The State asks this Court to grant its petition for a writ of certiorari so that that the Court might review the Ninth Circuit's exercise of its discretion not to certify to the California Supreme Court the question whether Mr. Saffold's petition to that court was timely under state law. This is not a proper ground for seeking a writ of certiorari.

As this Court and the federal courts of appeals have long recognized, the decision in a given case whether to certify a state law issue to the state's high court "rests in the sound discretion of the federal court." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974); *see also Micomonaco v. State of Washington*, 45 F.3d 316, 322 (9th Cir. 1995); *Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988); *Shevin v. Exxon Corp.*, 526 F.2d 266, 274 (5th Cir. 1976). "Certification is never compelled, even when there is no state law governing an issue." *Boyd Rosene & Assocs. v. Kansas Mun. Gas Agency*, 178 F.3d 1363, 1365 (10th Cir. 1999) (citing *Lehman Bros.*, 416 U.S. at 390-91). In determining whether to certify, a federal court may consider, among many other factors, the existence of sources such as "analogous decisions . . . and any other reliable data" from which state law otherwise may be divined. *Fischer*, 857 F.2d at 7; *see also Shevin*, 526 F.2d at 274-75. In addition, courts must take into account the "practical limitations of the certification

process," including "significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the court." *Shevin*, 526 F.2d at 275. "[D]elay that is not absolutely necessary should be avoided." *Id.* at 276.

This Court made clear in *Saffold* that it left "*to the Court of Appeals* the decision whether it would be appropriate to certify a question to the California Supreme Court." Pet. App. 26-27a (536 U.S. at 226-27) (emphasis added). The Ninth Circuit henceforth determined that certification was not necessary or appropriate, and that it could decide that Mr. Saffold's supreme court petition was timely based on "other sources" such as the contemporaneous orders of the California Supreme Court in other habeas cases. In choosing not to certify, the court of appeals avoided further delay of consideration of Mr. Saffold's federal habeas petition on the merits. There is no reason for this Court to disturb the court of appeals' decision in this regard.

The court of appeals' exercise of its discretion was particularly reasonable here because it had substantial reason for believing that certification would have been futile. "It . . . is clear that a federal court cannot compel a state court to answer questions in the absence of a state procedure." 17A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4248 (2d ed. 1988) (citing *Planned Parenthood Assn. of Kansas City v. Ashcroft*, 462 U.S. 476, 493 n.21 (1983)). California Rule of Court 29.8 gives the California Supreme Court discretion only to answer "*question[s] of California law*" certified to it by the federal courts. Cal. R. Ct. 29.8 (emphasis added). The issue here concerns only the meaning of a particular court order—not a novel interpretation of state law—and is, therefore, simply not a "question of law," as required by the certification rule. It appears that no case in which the California Supreme Court has granted certification involved explaining the meaning of a prior order; moreover, the California Supreme Court has on occasion declined to rule on questions certified to it by the Ninth Circuit. *See, e.g.*, *Bunney v. Mitchell*, 262 F.3d 973,

974 (9th Cir. 2001) (California court refused to answer question of when summary denial of habeas petition became "final"). Accordingly, there is no reason to review the court of appeals' decision not to certify.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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